

UNITED STATES OF AMERICA  
DEPARTMENT OF TRANSPORTATION  
FEDERAL AVIATION ADMINISTRATION  
WASHINGTON, D.C.

**RECEIVED**

MAY - 8 2009

**HEARING DOCKET**

IN THE MATTER OF AIR SUNSHINE, INC.

FAA DOCKET NO. CP09SO0004  
DMS NO; FAA-2009-0013 0183  
HONORABLE ISAAC D. BENKIN

**APPLICATION FOR AN AWARD OF ATTORNEY FEES AND OTHER EXPENSES PURSUANT  
TO THE EQUAL ACCESS TO JUSTICE ACT (EAJA)**

Pursuant to 5 U.S.C. §504, Air Sunshine, Inc. ("Applicant"), by and through undersigned representative, hereby applies for attorney fees and other expenses incurred *in the Matter of Air Sunshine, Inc.*, FAA Docket No. CP09SO0004 (Civil Penalty).

The following points are made in support of this application:

The official record discloses that on April 15, 2009, The Honorable Isaac D. Benkin, Administrative Law Judge, ordered the dismissal of the complaint against Applicant, by granting the Applicant's Motion to Dismiss. As such, Applicant is the **prevailing party**.

As more fully discussed below, the Administrator was not substantially justified in commencing the complaint and there are no special circumstances which would make an award unjust. As a result, Ventura incurred attorney fees and expenses in excess of **\$ 5,390.00**

Therefore the Respondent must be awarded the cost of attorney fees and expenses.

basis both in law and fact." *Immigration and Naturalization Service v. Jean*, 496 U.S. 154, 158 n.6 (1990), citing *Pierce v. Underwood*, 487 U.S. 552, 565-566 (1988).

In the present case, the agency's case lacked reasonable basis in both law and fact. Therefore, an EAJA award must be granted.

## ARGUMENT

### I. THE APPLICANT WAS THE PREVAILING PARTY

In order to be eligible for a fee award, under the EAJA, the applicant must be the prevailing party. In *Nackel v. DOT, FAA*, 884 F.2d 1378, 1379 (Fed. Cir. 1985), the court held that, "a party may be deemed prevailing . . . even if he does not ultimately prevail on all issues." This is as long as the applicant prevails in the main and achieves more than partial or limited success.

In the present case, considering the fact that all charges were dismissed, it is irrefutable that Applicant was the prevailing party in the underlying proceeding and achieved complete success.

### II. THE ADMINISTRATOR WAS NOT SUBSTANTIALLY JUSTIFIED IN INITIATING THE ACTION.


For government's position to be substantially justified, its position must be reasonable in fact and law. Thus, the legal theory propounded must be reasonable, the facts alleged must have reasonable basis in truth, and the facts alleged must reasonably support legal theory. *Nicolai v Del Balzo*, (1 993) NTSB EA-395 1.

In the case at bar, the mere fact that the case was dismissed on a pre-trial Motion for Decision speaks volumes as to Administrator's lack of substantial justification in bringing forth the matter. The Complainant's complete lack of evidence to support its conclusion suggests that a reasonable person would not have proceeded with the action against the Applicant. The Administrator's legal theory, that the Applicant flew an aircraft not listed on a carrier's operations specifications., was based on a momentary illumination of a light, not only is grasping

# CERTIFICATE OF SERVICE

I hereby certify that the foregoing document has been mailed by regular to Raymond Veatch, Attorney, Office of the Regional Counsel, Federal Aviation Administration, PO Box 20636, Atlanta, Georgia 30320, this April 27, 2009, and that an original and four copies were file with the Hearing Docket Clerk, Hearing Docket, Federal Aviation Administration Wilbur Wright Building, Room 2014, 600 Independence Ave., SW, Washington, DC 20591

Respectfully submitted,



Luis A. Irizarry  
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EXHIBIT A

**SERVICE LIST**

**ORIGINAL & ONE COPY**

Federal Aviation Administration  
800 Independence Avenue, S.W.  
Washington, D.C. 20591  
Attention: Hearing Docket Clerk, AGC-430  
Wilbur Wright Building—Suite 2W1000<sup>1</sup>

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The Honorable Isaac D. Benkin  
Administrative Law Judge  
Office of Hearings, M-20  
U.S. Department of Transportation  
1200 New Jersey Avenue, S.E.  
East Building Ground Floor, Room E12-320  
Washington, D.C. 20590  
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<sup>1</sup> Service was by U.S. Mail. For service in person or by expedited courier, use the following address: Federal Aviation Administration, 600 Independence Avenue, S.W., Wilbur Wright Building—Suite 2W1000, Washington, DC 20591; Attention: Hearing Docket Clerk, AGC-430.

**EXHIBIT B**

L.A. Irizarry & Associates, Inc.  
PO Box 37217  
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Date 4/27/2009  
Invoice # 83

**Bill To**

Air Sunshine, Inc.  
Mirmohammad Adili  
PO Box 37698  
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**Ship To**

Air Sunshine, Inc.  
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P.O. #

Terms

Ship Date 4/27/2009

Due Date 4/27/2009

Other

Item	Description	Qty	Price	Amount
Consulting Fee	FAA Enforcement Case : prepare darft EAJA application, review case file and regulations, case law: Re Case (3/24/2009)	5	125.00	625.00
Consulting Fee	FAA Enforcement Case : Prepared EAJA Application and file with docket(3/27/2009)	5	125.00	625.00

Thank you for your business

**L.A. Irizarry & Associates, Inc.**  
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Subtotal	\$5,390.00
Sales Tax (0.0%)	\$0.00
Total	\$5,390.00
Payments/Credits	\$0.00
Balance Due	\$5,390.00